No. 3622

United States
Circuit Court of Appeals

For the Ninth Circuit.

GEORGE DORAN, JR., HAROLD GRAVES and J. D. (JACK) MORRISON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellants' Brief

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CARBON COUNTY NEWS. RED LODGE, MONT.

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STATEMENT OF THE CASE.

The appellants were convicted in the United States District Court of the State of Montana, at Billings, Montana, on July 13th, 1928. The defendant, Morrison, was found guilty on all four counts of the Information. The other two defendants were found guilty as to counts three and four.

A motion to suppress the evidence was filed in said court on June 9th, 1928. The motion was submitted to the court and oral testimony introduced by the Government, but this testimony was not taken by a stenographer. The motion was denied by the Trial Judge.

The facts are as follows: three Federal Prohibition Agents and a Wyoming state enforcement officer came to the farm of the defendant, Morrison, on Gold Creek, Carbon County, State of Montana, on the 18th day of April, 1928. Morrison was not at home. The defendants, Graves and Doran, and Mrs. Doran were in the farm home, having lunch. There is a dispute as to whether or not the defendants Graves and Doran told the officers to go ahead and make the search. Some of the officers say that they were given permission. The defendants say not. But there is no evidence in the case that Morrison authorized the search, or authorized the two men working for him, or any one else, to give that permission. All agree that the alleged still sites were not within the fence lines of the Morrison ranch. On page 15 of the transcript will be found a plat prepared by the county surveyor, showing the Morrison ranch, also showing the location of the still sites, so-called. The survey was not disputed, so we can assume that the plat and survey are correct.

There was no objection made to the introduction of any

evidence concerning the alleged stills, or sites. The motion was to suppress the introduction of any testimony concerning any liquor found on the ranch of the defendant, Morrison, or anything disclosed by reason of the search of the ranch. No one was at the still sites at the time of the search. The stills were not in operation, and were not set up. One had apparently never been operated. There was some mash found, also boilers, coils, etc.

Morrison did not testify. The other two defendants testified that they were employed by Morrison, described the work they were doing, and had been doing; they denied any knowledge of any liquor being manufactured or kept on the place, or adjacent thereto, and there was no direct evidence of any connection between the two defendants, Graves and Doran, and any liquor or the manufacture thereof.

The only evidence against the defendant, Morrison, was that he owned the place; that he was there occasionally—possibly once a week during the short period of time that these two men, the other defendants, had been employed on the place.

The evidence discloses that there was no arrest made until the search of the premises and the still sites had been made. The evidence discloses that the barrels of liquor and the empty barrels were buried in the ground—two near the chicken house, and three empty barrels in the blacksmith shop or garage. The farm was enclosed with a fence and the buildings on the place were in a farm yard and in close proximity to the house. The barrels were found by the agents by using an iron rod which, they say, they pushed into the ground at various places until they discovered the barrels. There is no evidence in the case as to the length of time Morrison has owned

the place, and no direct evidence as to his knowledge that the liquor was on the place. The barrels containing whiskey were found at the corner of the chicken house. The three barrels buried in the blacksmith shop were empty barrels, but the agent testified that they had at some time contained whiskey. The defendants testified that the tanks found by the agent, near the barn, were water tanks that they had not yet placed in the ground.

This is not the ordinary whiskey-making farm, but the evidence discloses that from one hundred to one hundred sixty-five acres of this place was irrigated land. There were substantial farm buildings, the house was electric lighted, with modern conveniences, and was situated adjacent to a number of main traveled roads. The still sites were hidden—one in a coulee on the side of a hill, and the other in a "wash" or coulee. The agents testified as to certain mule tracks, tractor tracks and wheel tracks. This testimony is the only connecting link, if any, that might tend to establish the defendant's connection with the liquor operations.

At the opening of the trial, I asked permission to renew the motion to suppress the testimony. This was denied, and the testimony in reference to what the agents found on the premises went in under my objections. At the close of the plaintiff's case I asked that the two defendants, Doran and Graves, be discharged. This was denied, with the right to renew at the close of the case. This was done, and the motion denied.

SPECIFICATIONS OF ERROR.

1. The trial Judge erred in deciding that the search of defendants' premises and farm was legal.

2. The said Court erred in overruling defendants'

written motion to suppress the evidence herein made and filed prior to the trial of said cause.

3. The said Court erred in overruling defendants' oral motion to suppress the evidence, same made at the conclusion of the Government's case.

4. The said Court erred in refusing to grant the motion immediately at the close of the plaintiff's case.

5. The said Court erred in denying defendants' motion immediately at the close of the trial.

6. There was no evidence lawfully obtained to sustain the verdict herein.

7. There is not sufficient or any evidence upon which the verdict of the jury should be allowed to stand.

8. The verdict is against the law.

9. The verdict is against the evidence.

10. The said Court erred in giving and rendering judgment against said defendants on such verdict.

ARGUMENT.

The first three assignments of error will be argued together. The Government agents made the search without a warrant. This we contend was not lawful under the circumstances disclosed in the testimony. The agents were trespassers, for it is evident that they went to this farm and farm home for the purpose of making a search of the premises. They were not fortified with a search warrant, legally issued. If they had ample evidence, or any evidence, that would justify a search of the premises, no reason was given or offered by the agents, or any of them, for not obtaining a search warrant from the proper court or commissioner, authorizing and directing them to search the premises. It would seem that in the orderly administration of justice and the enforcement of the National Prohibition Act, the government officers

and employees should be required to follow the procedure provided in the Federal Statutes and that they should not be permitted to arbitrarily make searches of homes, residences, farms and farm buildings indiscriminately. It is true in this case that they found liquor, but that does not justify an unlawful search. If the agents had evidence, or reports had been made to them of the law being violated on these premises by these defendants, or any of them, and this was sufficient to warrant the court to order a search, the better practice would have been to have obtained a search warrant and then the defendants would not be in a position to object.

It is difficult to reconcile the decisions of the various courts on this question. Some courts grant more leeway than others. But in this case, if the agents had the right, without making an arrest, to go on these premises, taking an iron bar and push or drive it into the ground at different places on the ranch until and when they discovered some obstruction in the ground, and, upon excavating, find the evidence of liquor or barrels of liquor—if that is not a violation of the defendants' constitutional rights, the officers would have the right to excavate the whole farm of the defendant in making a search, and the defendant could not protest or object thereto.

Now, in this case, there isn't any evidence as to the information imported to the agents, and we will have to assume that the agents went to this place without any information whatsoever and proceeded to dig around until they found the evidence complained of. We have no complaint to make as to the search of the still sites, for these were not within the boundary lines or fence lines of the defendant's ranch.

The testimony discloses that the agents drove to the

house. Agents Collins and Denny went to the door and asked if Mr. Morrison was at home (Tr. pp. 34, 41, 60.) Not finding him at home, they proceeded to search the house. They afterwards found the still sites, and after finding those, they made the search of the premises and barnyard of the defendant, Morrison, which we complain of.

No power exists at common law to make a search and seizure without a warrant. Malewicki v. Quale, 298 Fed. 391. The fact that liquor was found does not justify or make legal the search. We are only complaining in this case of the introduction of the liquor insofar as the appellant, Morrison, is concerned, for under the authorities, objections to a search can be made only by the owner or by one in possession. U. S. v. Gass, 14 Fed. (2nd) 229.

I am familiar with the case of Hester v. U. S., 44 Sup. Ct. Rep. 445, in which the Court says that the special protection accorded by the fourth amendment to the people in their "persons, houses, papers and effects," is not extended to open fields, and I have no fault to find with that decision, but in the case at bar the barrels of whiskey were not exposed. They were covered and buried in the ground. Nothing was done by any of the defendants while the agents were there, in connection with the barrels. Hence, the agents must have been informed as to the location of the liquor and must have known where to make the search to find it, for they did not testify that there was anything in the appearance of the ground where the liquor was found, outside of the blacksmith shop, nor inside of the blacksmith shop, and hence I submit that it was the duty of the officers to have obtained a search warrant in order to make the search legal and the evidence discovered, admissible.

I have not been able to find any case where the facts are similar to the facts in this case, and therefore am not citing any cases. The principle of the law has been determined by this court in a number of cases. It is just a question of whether the facts in this case warranted the search. Liquor was found within the enclosure of the farm buildings. The buildings were close together, and about fifty or sixty yards from the house. The defendants were residing on the place, making it their home, and I contend that the immediate farm yard is appurtenant to and a part of the home and residence. There being no evidence of the sale of liquor, or the manufacture of liquor in the home, this testimony, under the case of Agnello v. U. S., 70 Law Ed. 1, U. S. Sup. Ct., and the case of U. S. v. Armstrong, 275 Fed. 506, was not admissible, and the search was unlawful. There is nothing in the testimony that would warrant the court in finding that these parties were likely to get away, or that the liquor, stills, or still sites would be removed.

The other six assignments will be argued together, for they involve the question as to whether or not there was sufficient, or any evidence upon which the verdict of the jury should be allowed to stand. Summing up this evidence, it is apparent that the appellants Doran and Graves were employees of appellant Morrison. Both had been working but a short period of time. Both disclaimed any knowledge of the violation of the National Prohibition Act to the Prohibition officers (Tr. p. 38.) These two defendants were convicted on the third and fourth count of the Information; that is, possession of liquor and maintaining a nuisance, and I submit that there isn't any testimony from which it can be inferred that these defendants had any knowledge of the buried liquor, and

that is the only liquor that was found by the officers on the premises.

The instruction of the Trial Judge (Tr. p. 101) is the law in this case, and it is the law in all criminal cases where circumstantial testimony is relied upon for a conviction. It would seem just as reasonable to assume that these two defendants had no knowledge of the buried liquor as it would to assume that they did have knowledge of the liquor. There was no liquor in the house, and there was no liquor at any other place on the ranch, and it is just as reasonable to assume that they had no knowledge whatsoever concerning the violation of the National Prohibition law as that they did have knowledge of it. There isn't any evidence of a sale, no evidence that Morrison was engaged in hauling liquor, or selling liquor. Neither is there any evidence that he was engaged in the manufacture of liquor, or that these two defendants participated in the manufacture of liquor. The testimony shows that they were employed for a lawful purpose and their employment is described at length in the testimony.

In the case of Lambert, et al. v. U. S., 26 Fed. (2d) 773, the Court said:

> "He was employed in the place for a lawful purpose and the most and the worst that can be said against him is that he knew what was going on about him, but for this he was not prosecuted, and such knowledge, on his part, standing alone, did not constitute a crime."

And that is all that we have in this case. There is some evidence about some tracks, but there isn't any evidence that these two appellants had any knowledge of the manufacture of any liquor in either of these two stills, or at these two still sites. There isn't any evidence in the case

that these stills have been operated, nor when they had been operated, if ever, or that they had been operated by any of these appellants. The mere fact that there were stills outside of the premises of the appellant, Morrison, is only a circumstance. They may have been there for some time. It might be that these men were installing a still for the purpose of manufacturing liquor, but we were not convicted of that. But there is evidence, as I see it, that the still found in the "wash" or "draw" had not been operated, (Tr. p. 35.) These two appellants must have been found guilty, if at all, upon circumstantial evidence, and the court in charging the jury in reference to the possession charge, said as follows (Tr. p. 103):

> "In reference to the liquor found buried on the premises, the defendants as a matter of course are not guilty of possessing that liquor, unless they had knowledge of the fact that the liquor was kept and buried there. If they had such knowledge, they are guilty of that offense also; but otherwise you will find them not guilty."

and this immediately became the law in the case. Likewise, the Court said in reference to the nuisance charge (Tr. p. 103):

> "I further charge you that if you find that this farm was a place where intoxicating liquor was kept in violation of law for a considerable period of time, it was a common nuisance and you will return a verdict of guilty as to that count; otherwise, you will find the defendants not guilty."

In the first place, the record is barren of testimony showing any actual knowledge on the part of these two defendants of the liquor in question. It is likewise barren as to any facts showing that the liquor had been kept

in violation of law for a considerable period of time and this was necessary under the charge of the court in order to constitute a nuisance. There is not a word in the testimony of these two defendants that would tend to incriminate them except possibly that they were on the place and employed there, and might possibly have known what was going on.

Now, in reference to appellant Morrison: Morrison did not testify. The only evidence against Morrison is that he was the owner of the farm in question, but as to when he became the owner there is no testimony, other than that the defendant, Doran, commenced working on the ranch on February 2, 1928 (Tr. p. 87), so that it can be assumed that Morrison owned the ranch at that time and from then on. The witnesses, Doran and Graves, testified that Morrison was over there possibly twice a week and stayed over night, and possibly a day or two (Tr. pp. 84, 96, 97.) There isn't any connection with Morrison and the stills or the liquor or the buried barrels, other than the fact that he was the owner of the ranch and was out there occasionally during the two month period. As far as the evidence in this case is concerned, it might have been proper for the jury to find the two appellants Doran and Graves guilty of manufacturing liquor or of possessing property designed for the manufacture of liquor, but Morrison is not, and was not connected up in this testimony of having knowledge of the two still sites and stills. It is just as reasonable to suppose that he had no knowledge of the liquor, stills, or still sites, as to suppose that he did.

So that the jury did not follow the instructions of the court in arriving at their verdict. I have no complaint to make as to the charge of the Trial Judge. The charge

is clear, concise and fair to the defendants. In fact, in my humble opinion, it is a model charge, and if the jury had followed the instructions of the court this case would not be here.

Upon my oral argument of this case I will go more into details as to the testimony.

In conclusion, it is respectfully sumitted that the judgments entered in this case should be reversed.

Respectfully submitted,

JOHN G. SKINNER,
Attorney for Appellants.